United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

-against-

PETER POSTMA, NICHOLAS ROBILOTTO and JOSEPH P. McCONNON,

Defendants,

PETER POSTMA and JOSEPH P. McCONNON,

Appellants.

BRIEF FOR APPELLEE

Statement of the Case

This is an appeal by Peter Postma and Joseph J. McConnon from a judgment of conviction and sentence entered against them in the United States District Court, Northern District of New York, by Hon. Stephen W. Brennan, United States District Judge.

The indictment, as originally returned by the grand jury, contained one count charging Peter Postma, Nicholas Robilotto and Joseph P. McConnon of unlawfully conspiring with others unknown, to obstruct, delay and affect interstate commerce, and the movement of a commodity in interstate commerce by extorting from eleven truck owners doing an interstate business.

The indictment (3a) charged the defendants Postma and Robilotto with using their positions as business agent for the Local 294 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, American Federation of Labor, to obtain property from haulers of general merchandise, doing business in interstate commerce, with their consent, by the use of threatened force and fear.

The indictment charges the defendants Postma and Robilotto of obtaining $10,000.00 from the truckers by threatening force and fear to cause work stoppages and actually did cause work stoppages of goods in interstate commerce until the trucking companies made the payment aforesaid.

The statute alleged to have been violated is 18 U. S. C. 1951. *Interference with Commerce by threats or violence.*

The verdict and sentence are set forth in Appellant's brief. The charge against Robilotto is not involved in this appeal.

Counter-Statement of Facts [1]

From 1936 until after the period covered by the indictment, appellant Peter Postma, was the Business Agent Local 294 of International Brotherhood of Teamsters at Albany, New York (625a).

Defendant Robilotto during the period of the indictment, was also a business agent of this Union (23a).

The Vogel Trucking Company, Albany, New York; Monarch Trucking Company, Watervliet, New York;

(1. References in parentheses are to page numbers of appellant's appendix unless otherwise indicated).

Palmer Lines, Great Barrington, Mass.; H & H Trucking Company, Hudson, New York; Dorn Transportation Company, Rensselaer, New York; Kimball Motor Dispatch, Inc., Great Barrington, Mass.; B & P. Transportation Co., Lee, Mass.; Brown's Express, Inc., Pittsfield, Mass.; Chamberland Express, Inc., Schenectady, New York; Imperial Motor Express, Rensselaer, New York; and Needes Express Company, Kingston, N. Y. were trucking companies operating in and/or around the vicinity of Albany, New York and haulers of general merchandise, goods and wares, doing business in interstate commerce (52a).

The Highway Transport Association of Upstate New York, Inc. is an organization of truck operators in the Albany, N. Y. area. This area is the same territorially as Local 294. All the trucking companies set forth above are members. While the organization has many purposes, perhaps the principal one is to appoint a committee each year to negotiate a labor contract with Local 294 (54a-55a). When negotiations were completed each member would sign separate contracts with the Union.

Trailerships Inc. transported truck trailers by ships on the Hudson River between New York City and Albany, N. Y. (150a). Defendant McConnon was in charge of the Albany operation (179a). There were business relations between the truck operators and Trailerships, Inc. (180a). On McConnon's payroll was a representative of Local 294 (587a). There were many dealings of one sort or another between McConnon and Postma (151a).

In the summer of 1951 the union and the committee of the Highway Transportation were negotiating under a wage reopening clause of the then current contract. After

much negotiation an agreement was reached calling for a wage increase of 13¢ per hour. In referring to this increase, Postma angrily stated to the operators present:

> "he would accept this 13¢, but next year when the contract expires in the fall, I will give you a contract you cannot accept and when you are out on the street I will jam it down your throat." (58a-407a).

Robilotto and McCall were present at the time of these remarks (201a).

In August, 1952, when the then current contract expired, the Union submitted to the operators a series of demands which included a wage increase of 44¢ per hour, improved vacations, pension plan and several other demands (61a). The operators stated the proposal was "ridiculous" and estimated the total demands would cost $1. per hour (408a & 130a). At that time the employers made a counter-offer involving the cost-of-living index (62a).

Intermittent negotiations were continued during the months of August, September and October. During this time, Postma exhibited to the committee for the operators, a strike sanction from the International Union (64a, 410a). The negotiations at this time resolved upon some seven separate points, of which the increase in wages was one. The employers increased their offer of a wage increase to 8¢ an hour and then to 10¢ an hour plus four of the other points (413a). When this offer was presented to defendant Postma, it was met with a flood of profanity and a refusal containing threats (413a, 206a).

During most of the month of October, negotiations were suspended but were resumed on November 6, 1952, at a meeting at which the full union negotiating committee was present (207a, 415a). Postma was the sole spokesman for

the union and Judge Rubenstein negotiated for the truckers' association (66a). It appeared at this meeting that an agreement could be reached on all points (416a). The following day the truckers' committee met and authorized Judge Rubenstein to offer the 10¢ an hour increase and all but two of the other seven points (417a). It was explained that this was merely a bargaining maneuver. On that day the union was represented by only Postma, McCall and Robilotto (68a). When Judge Rubenstein offered the five points, Postma became very indignant and refused to further discuss the matter (417a). After a nudge from Robilotto, Postma gathered his papers and walked from the room with McCall and Robilotto (209a). He was urged to stay and continue to talk but he refused to do so and when asked what this all meant, he said "You'll find out." Shortly thereafter on the same day, the strike began (419a).

The truckers set up headquarters at the Ten Eyck Hotel and met frequently in order to find ways of ending the strike.

On November 13, 1952, Mr. Vogel and Mr. Mayberry both truck operators and active in the association, were sitting in the restaurant at the Ten Eyck Hotel when McConnon came to their table (72a). He left, returned, and stated that he would like to see Mr. Vogel outside (72a). McConnon told Vogel that he had been talking with Postma and the strike would be called off if the operators would give the seven points, plus $10,000 (73a, 74a). Vogel returned from the hall to the table and stated to Mayberry: "Ed, this looks like a stick-up," and told him what McConnon had said (82a). The operators had never before been asked to pay money to a labor leader. After a few minutes, another operator, Mr. Dastoli joined

Vogel and Mayberry and was told what had happened (317a). Vogel and Mayberry took two cards from the table and drew up two lists, one of the seven points and the other of possible contributors. (Govt. Exhibits 1, 2, 85a, 87a). After some conversation they agreed to go along with the proposal and made a list of operators setting forth the contributions of each, totaling $10,000. Vogel then told McConnon that the operators would pay the $10,000 (91a).

The following day, McConnon called Vogel who was at the association's headquarters and asked him to come to the lobby of the hotel. McConnon told Vogel that the price had been increased from $10,000 to $30,000. "Nick then got his car in and they wanted thirty thousand instead of ten" (92a). Vogel assumed that "Nick" referred to defendant Robilotto (94a). Vogel returned to the headquarters and discussed the newest offer with the other members and it was rejected. Vogel thereupon returned to the lobby where McConnon was waiting for him and told him that the operators would not pay the $30,000. (95a).

On the following day, McConnon again called Vogel at the operator's headquarters and they met in the hallway of the hotel. Following is the testimony of what took place at that conversation:

> "He said that they, Pete and they would then take the $10,000., and they wanted a small committee and get a separate room, and they didn't want Judge Rubenstein in on the final negotiations and they would furnish a committee of three. * * * Well, first I told McConnon to find out whether Mayberry, myself and Mel Wood would be satisfactory, and then I

contacted Rubenstein and told him, asked him to get a room at the Ten Eyck, that we were going to meet with a committee of three from the Union and that he was to be excluded" (96a).

McConnon later reported to Vogel that the three employer representatives were acceptable and Vogel told McConnon the room number where the employees representatives would meet with the union committee. That afternoon, Postma, Robilotto and McCall met at the designated place with Vogel, Mayberry and Wood (100a). The meeting lasted three hours of which less than five minutes was devoted to the discussion of the strike settlement (101a). Postma and Robilotto talked ceaselessly about a trip to a union conference in California. Shortly before the finish of the meeting Postma beckoned Vogel over to the side of the room beyond the hearing of the others and said:

> " 'This town is very small and these operators will talk' and I said nothing. And he finally said to me 'Well they are all getting theirs. I am going to get mine.'
>
> Q. Is that the extent of the conversation?
>
> A. Yes." (102a)

Immediately after this conversation Postma said the seven points were acceptable and each side agreed to call meetings of their respective members on the next day for the approval on each side of the settlement of the strike. On Sunday, the next day, the strike was ended and the trucks began to roll.

The $10,000 was thereafter collected from the various members of the association (105a). McConnon called at Vogel's office where Vogel gave him $7500.00 to take to

Postma (106a). McConnon counted the money and it was put in an envelope. McConnon told Vogel at that time that Postma wanted a list of the ones that contributed (106a). The following day McConnon returned and brought back a $500 bill that was in an envelope and said that Postma wanted smaller bills. Vogel suggested that he go to the bank (107a). On November 25th, McConnon again came to Vogel's office, whereupon Vogel gave McConnon the remaining $2500 (109a). McConnon told Vogel that he gave the payments of the money to Postma at the Wellington and the Ten Eyck Hotels (112a, 114a).

A government witness, Mr. Hickey, Vice-President of the International Brotherhood of Teamsters, the parent body of the Local 294, testified that early in 1954 McConnon called to see him, (Hickey) at the latter's New York City office. Mr. Hickey stated in substance that McConnon told him that he had become interested in the strike because his company was losing money and that he had gone to Postma and received from Postma the offer to settle the strike for $10,000. McConnon told Hickey, and Hickey so testified, that he had passed the money on to Postma (488a).

Further evidence that Postma received the $10,000 came from the testimony of Mr. Vogel in response to a question by defense counsel:

> "No. There was a time in 1953 when I was in the Ten Eyck Hotel—in the Ten Eyck Hotel, and I walked in there and I see McConnon and Postma in an argument. I asked Postma what the trouble was, was it over the $10,000, and he said 'no' he got that, but it was over some money involving trailerships." (176a).

POINT I.

The Verdict is supported by the Evidence.

The crime described in these facts recalls a terror of former years hopefully forgotten. The Court cannot read this brief statement without realizing the effect of this act upon society, the community, and these particular victims. The crime itself is graced only by the more modern refinements of its execution. Its repulsive object has not been changed. The advocates of its prosecution might well have been moved to a justifiable vigor. Yet, it is submitted that the record discloses a presentation of fact and law that was most properly and fairly restrained in every detail. Upon such a presentation the jury returned the result of its deliberation. Its verdict of guilty having been entered, all contradictory arguments of these stated facts are now barred from the consideration of this Court. The government therefore now urges upon the Court the persuasion of these facts.

The proof that the government submitted was at all times clear and consistent. It contended that Postma had a plan to extort a sum of money from the freight operators beginning in 1951 and first evidenced by his threat that he would "ram it down your throats." In 1952 he pursued his plan throughout the negotiations, causing a strike to be called and placing the operators in a desperate situation from which there could be no refusal of his demands. It was then that McConnon presented himself upon the instruction and direction of his employer to see what he could do. At this meeting with Postma, McConnon joined the criminal object of Postma's existing design and the conspiracy between the two was born. McConnon, having then become a co-conspirator, took the necessary steps to

complete the agreement. This proof was complete at the end of the government's case and it fits perfectly within the statement of law made by the Court in ruling upon McConnon's motion for dismissal, when the Court said of McConnon in the conspiracy.

> The Court: "I think it is very plain that the evidence as it stands now indicates this, that McConnon was connected in some way with Trailerships. Now, he learned from some source, apparently up to this point not disclosed, that the strike could be settled, upon the payment, and interstate commerce began to move, upon the payment of $10,000 and the granting of seven points. Having that knowledge, that that was the objective, yes, an objective of operation, he allied himself to it and sought to advance it. He went right to the source where money might be expected to come, aided in obtaining it and transmitted the request to that source. Then he very affirmatively took the step of conveying the money, et cetera. It seems to me it could be plain that a man becomes a conspirator or a member of a conspiracy, or makes a plan which is only in one man's mind, become a conspiracy when he has knowledge of it and with a wilful, deliberate affirmative act upon his part, furthers it. It seems to me plainly that McConnon is within that." (517A, 518A)

This is also the same allegation described by the Court in the charge to the jury when the Court, beginning at page 754A outlined the contention of the government, and the same argument that counsel for the government made in his summation to the jury.

This, therefore, is no new conspiracy charge conceived by the government as an afterthought. It is exactly the

same charge set forth in the indictment, proven by the testimony, argued by government counsel, and charged by the Court.

The evidence sustaining this charge is overwhelming. The statement of Postma in the 1951 negotiations was recognized by the operators as a threat. It came after the operators had already agreed upon a 13¢ an hour wage increase that should have been most acceptable to Postma, inasmuch as a smaller amount would have been the result of the arbitration called for in the contract in the case of a failure to agree. This threat was followed up at the beginning of the negotiations in 1952 by the exorbitant and ridiculous demands set forth in the union's proposals, which included a wage increase of approximately $1.00 an hour, when the highest demand before had been 25¢ an hour. The government contended that throughout the negotiations of 1952, as consistent with his plan and evidencing it, Postma did not negotiate in good faith, did not properly represent the interests of his men; but instead, consistently sought to avoid an agreement so that a strike could be called, thus preparing the way for his extortion. This is clearly evidenced by the fact that throughout the negotiations Postma never retreated from his original demands but rather at all times kept the committee of the freight operators bargaining against themselves. When at a meeting in September the freight operators raised their offer to 10¢ an hour Postma refused in a wild, angry, and profane demonstration. At the meeting at the Ten Eyck Hotel on Friday following the election, after there had been an agreement upon the seven points, the operators attempted to negotiate in a manner allowing themselves some freedom and with the purpose of keeping Postma from again backing off and increasing his demands. Postma again refused discussion, gathered his

papers in another angry demonstration, and walked from the room. Shortly thereafter a strike was in effect.

The minutes of the local union received in evidence as Exhibit No. 7 and read into the record beginning at page 478A further corroborates the fact that Postma's activities were only to further his own criminal plans and not for the benefit of the men he represented. At a meeting of the whole body on August 17th, 1952 Postma reported back "the final offer," which was then only 2¢ an hour. A vote was taken and a strike was authorized, based upon Postma's recommendation, when he as a negotiator of long experience had to know that such an offer was merely a preliminary one. There was no other meeting held of the entire body until November 16th, 1952 when Postma reported to his men (483A) in vague terms only five points of agreement when actually the operators had agreed to seven points. It was at this meeting and upon Postma's partial submission of the points that the body of men voted to end the strike. Postma never, therefore, in accordance with regular and accepted union practices, (43a) reported to his men any of the offers received by him before the strike, which offers were on the whole seven points eventually agreed upon. This exhibit read with the uncontradicted testimony clearly proves that the strike accomplished nothing for the union men and casts the only intelligent inference that it was created by Postma for his own purpose in shaking down $10,000.

The Court must fully realize the desperate situation that existed during the week of the strike when other freight operators, and necessarily competitors, were signing "if and when contracts." Thus the operators, having come through the long and extended period of meaningless and threatening negotiations were faced with an actual

strike and their frenzy was further aggravated by the increasing loss of business to their competitors by the signing of such contracts. Indeed, on the Thursday of the strike the victims were ripe for the blow. It was on that day that McConnon first actively entered the testimony. McConnon knew Postma well and from his conversations with Vogel he also knew that the parties were at a standstill and the situation was critical for the operators. McConnon's activities then are most clearly seen from his admission to Hickey (488a). Upon instructions from his employer McConnon went to Postma to see what could be done. When told the plan to shake down the operators for $10,000 McConnon had to understand, from his experience, all of the machinations of Postma in creating the scheme. McConnon agreed to the object which was in Postma's mind since 1951 and McConnon became a conspirator. Having that knowledge and having joined in the criminal object with Postma, McConnon took the first affirmative step of carrying the demand to Vogel. From the very statement that McConnon made to Vogel in presenting the demand, this Court has sufficient proof that McConnon had entered into a criminal conspiracy. Although the negotiations, the excessive demand, and the strike itself was not criminal, the infliction of a design to obtain $10,000 by them was obviously criminal. McConnon could have no excuse. He could have no explanation. He had to know that he was doing something wrong. Having this knowledge McConnon proceeded to perform the necessary acts to perfect the object of the conspiracy. Can he seriously urge upon this Court an argument that these acts were innocent? McConnon is a man who has been associated in businesses for many years, and has had business dealings with Union representatives. He is a man well aware of the practices of business and particularly

union procedures. With this background can he deny at least the sophistication to realize that he was carrying out a criminal object? (*U. S.* v. *Masiello*, Fed (2d) (2nd Cir.) decided July 8, 1956.) How can he deny the implications of the raising of the demand from $10,000 to $30,000, and the carrying back and forth of messages and the making of arrangements for the meeting? Does this not suggest that McConnon knew that Robiletto was an accomplice or co-conspirator in the scheme? How can be avoid the guilt which attaches to his activities in transferring the $10,000, the changing of the $500 bill, the making of lists, and the statement of where and how he had delivered the money?

In the events that followed the demand on the Thursday of the strike, Postma attempted to prepare his future defense by remaining disassociated and having the co-conspirator, McConnon, take all of the guilty steps. But Postma's guilt can be seen in his very effort to avoid it. When on the Saturday during the strike a meeting had to be arranged between the operators and the union men, McConnon was sent with the instructions to arrange for this meeting with only three of the operators to be present and only three of the union men. The three operators had to be approved by Postma and their number could not include Judge Rubenstein, whose presence would have revealed to an officer of the court undeniable evidence of the criminal act in progress. Through McConnon the operators were told that they should reserve a separate room from their strike headquarters for such a meeting. In compliance wtih these demands the operators asked Judge Rubenstein to reserve a room and this was done in his name. The three Postma-approved operators, Vogel, Mayberry and Wood, entered this room at the appointed time and awaited the union representatives. Shortly thereafter, Postma, again accompanied by only McCall and

Robiletto, entered the room. How could Postma have knowledge of the correct room number had he not talked to McConnon?

This Saturday meeting was itself so strange and unusual that it arouses marked suspicion. In an atmosphere contrastingly calm to that which surrounded the negotiations before the strike, three hours were spent storytelling of the trip to the Coast to the union convention by the three union representatives. It was at the ending of this lengthy incantation that Vogel took Postma into a corner and asked what was going to be done, wondering, if indeed, the strike was to be settled. Postma then replied "This is a small town and there are those who will talk, the others are getting theirs and I am going to get mine." The contrasting atmosphere of this meeting shows the connection of McConnon's messages. Postma's admission is direct evidence of the intention that had been in his mind since 1951 and the part that he was playing in the conspiracy.

The proof against Postma was most conclusive at this point. His faintest plea of innocence is shattered by the admission to Vogel when questioned as to whether an argument with McConnon was about the $10,000 and Postma said "No, I got that all right."

The record, therefore, shows that not only was the crime proven in every detail by the testimony of the victims but substantiated by independent proof and by the admissions of the two conspirators. It is not a complicated conspiracy. It was presented to the jury carefully and clearly by the submission of the proof and the charge of the Court. Each of the participants acted knowingly and intentionally. McConnon agreed to Postma's plan and

joined the conspiracy upon his own volition, not at the instigation of the operators and not because of any threat or similar inducement by Postma. This is a crime not to be lightly considered. From the proof submitted and the charge of the Court, a jury could come to no other conclusion than the positive guilt of both defendants.

POINT II.

In the case of the defendant McConnon the evidence was sufficient.

A. To support the conviction in establishing he joined in the conspiracy in all its aspects and results.

B. To establish the conspiracy alleged in the indictment.

C. To establish the conspiracy and no inflamatory evidence prejudiced him. The Judge properly charged the Jury.

The first three points raised by the defendant McConnon and most of his fifth point do not lend themselves to a separate discussion. Quite simply he is urging that since he was interested in the resumption of interstate commerce he could have no intention of delaying or obstructing it; that since his interests were the same as the victims, he could have no necessary stake in the object of the conspiracy; and that no conspiracy between Postma and McConnon was proven by the government. McConnon's position here upon appeal is no different from the one taken throughout the trial; both in his arguments to the Court and to the jury. At all times he questioned his intent to delay, affect or obstruct interstate commerce, when

his whole desire was to affect its continuance. He repeatedly urged that he was not a friend of Postma but a friend of the operators. Both of these facts can be true and yet lend no merit to his position, because his argument is based upon a false premise. The valuable object of all the conspiracies contemplated and made criminal in Section 1951, Title 18, insofar as the defendants initiating them are concerned, is the obtaining of money or other consideration, personally valuable to themselves, by the actual or threatened obstruction or interference with interstate commerce. A study of the facts of this case shows that the object here is no different. Certainly Postma was not interested in permanently interrupting interstate commerce.

U. S. vs. *Varlack,* 225 Fed (2d) 665;

Bianchi v. *U. S.,* 219 Fed (2d) 182;

Hulahan v. *U. S.,* 214 Fed (2d) 441;

U. S. vs. *Campagna,* 146 Fed (2d) 524;

Nick v. *U. S.,* 122 Fed (2d) 660;

U. S. v. *Masiello,* Fed (2d) (2nd Cir.) decided July 8, 1956).

He was interested in obtaining $10,000.00. In all of the cases the interference with interstate commerce is a means to an end.

The defendant McConnon, in his brief, terms a conspiracy to injure himself a "bizarre theory." He demonstrates his misunderstanding of the nature of the offense he conspired to commit. The strike itself was not illegal and the commerce could only be hurt so long as the strike continued. But the basic element of the conspiracy was the agreement to extort $10,000 from the operators and it

was the extortion that burdened interstate commerce, not the strike. Instead of being injured by the conspiracy, McConnon actually benefited by it, as he made no contribution to the fund, and the payment of the money by the other operators enabled him to resume his business. When it is understood that the extortion was the burden upon commerce, then that part of the appellant's argument that there was no agreement upon his part to "jam a contract down the operators' throat" seems to be specious. The same is true of his claim that there was "no evidence of an intention by McConnon to obstruct his own commerce or to put his friends and allies in fear". The operators were already in fear of injury to their business by the strike, but as the strike was legal there was nothing "wrongful" in the use of such fear to accomplish the legitimate end of the strike. When, however, McConnon agreed with Postma to get him $10,000 to settle the strike, then the use of fear became wrongful. It was not necessary for McConnon to instill fear into the operators, that was the part that Postma had already played. McConnon may not have shared in any part of the $10,000, yet, he had received from his acts a very important benefit. "An extortion" as defined in the statute "in no way depends upon having a direct benefit conferred upon the person who obtained the property." *U. S.* vs. *Greene*, 350 U. S. 420.

McConnon joined with Postma in a conspiracy to extort which burdened interstate commerce, the result of which was of definite interest and benefit to him and which conspiracy was formed well within the time set in statute of limitation.

U. S. v. *Perlstein*, 126 Fed. 2d, 879, cert. den. 316 U. S. 678.

McConnon attempted to argue throughout the trial that the only conspiracy he could have joined was one with the operators to bribe a union official. He now argues in the same vein and adds that there could be no other conspiracy proven. This contention falls in the face of the fact that he went upon the instructions of his employer directly to Postma and was not sent by the operators. This argument of McConnon's, still being presented to this Court, is the same one which appeared in the opening statement of his counsel when he described a situation totally different from the facts proven.

(Appendix to Appellee's Brief)

"Who was McConnon How did he come on the scene at all? I say to you that Mr. Vogel brought Mr. McConnon in, to carry the money that Vogel obtained. This was a bribe that was being passed through an intermediary, and we have had long relations with Mr. Vogel who helps us out in business and we have been victimized by Mr. Postma, too, and we stand here charged with extortion . . .

"We were asked by Mr. Vogel to go to Mr. Postma and ask whether he will meet in small committees so that they can heal the rift that developed between them and Postma and Vogel are old friends . . . And McConnon tells Postma what the room number is and that is all he knows about it. And he never mentioned a single word about Robiletto. He doesn't even know the man. He met him once at the bar where all these people were gathered, and was introduced to him and that is all he knows of him. He knows of no $30,000; he never mentioned $10,000; he never mentioned one cent and the next thing he knows after the meeting Vogel calls him and says 'come up and have a drink with us', so he goes up to the truckers, not to the union

people and he says 'what happened' and he says 'I think the matter is settled and Peter Postma is to bring it to a vote tomorrow morning', and tomorrow morning evidently was a vote and the employers' terms were accepted and the following Tuesday Vogel called McConnon and said 'come to my office' . . .

"That is the case. There is no conspiracy involved there. We are a messenger for the bribing employer in this case."

There was not one word of evidence submitted to substantiate the statement by counsel in this opening. On the contrary, the evidence contradicted it, as seen by the testimony of Vogel and McConnon's admission to Hickey. It is not unfair to assume that if counsel chose to make such allegations in his opening statement to the jury he should have been prepared to substantiate them by evidence.

"Besides, it is only fair to say that an opening statement should not have been made by counsel, if he did not expect to introduce evidence tending to substantiate it. It is not, we think, a response to this criticism to say that he expected to prove the point stated to the jury by witnesses introduced by other defendants. His statement, in several particulars, was susceptible to verification only by his client."

Lewis v. U. S. 11 Fed (2d) 745, 747.

If such an opening without substantiation were delivered by the prosecution, it might well be cited as reversible error. Certainly the defense owes some obligation to the court and jury even in a criminal case. This discrepancy, however, is not presented here for the purpose of invoking any criticism of defense counsel; it is rather to show that McConnon's defense had its fair share of fluctuations which the jury could rightly consider.

The charge delivered by the Court was unscrupulously fair and in fact was just as the Judge stated in the argument on the request to charge, (769a) "to tell you the truth, I think I gave the defendant the best of it all." The charge was proper and sound in every detail, consistent with the volumes of decisions on the law of conspiracy and completely consistent with the prosecution's presentation. (747d)

The Court:

. . . "A person may be guilty of the crime of conspiracy even though he had nothing to do with the formation of the plan and even though he did not know of such a scheme until long after its inception; he may be guilty of the crime even though he did not know all of the details of the plan or the operation thereof; and even though he did not know all of the details of the plan or the operation thereof; and even though he did not know all of the parties connected therewith. It is sufficient if the evidence establishes that he, knowing that such a plan or scheme or arrangement was in existence, if he thereafter did anything designed or intended to help effectuate or carry on the purposes thereof.

"Putting it in other words, because the argument has been used here, in the course of this trial, as to a person joining a conspiracy, putting it in these words, an individual becomes a member of a conspiracy by his intentional participation in it, or in his conscious, active cooperation, in the furtherance of its purpose. It is not necessary that he be its creator, or co-author, but it is sufficient if he adopts it as his own. Innocent acts or the performance of normal activities in themselves are not sufficient to establish membership, but it is his knowledge of

a wilful scheme or plan, and the intentional participation in it, in the furtherance of its objection."

McConnon in his brief, seeks to avoid the recognition that a conspiracy is proven. Conceding its existence, for purposes of argument, he contends that the admission of proof of Postma's acts and declarations before McConnon joined the conspiracy was prejudicial to him. It is submitted that the charge of the court was most direct and clear in this regard.

The Court: Page 753A

. . . "And I want to make this entirely clear to you, that the statements or acts of a person charged with a conspiracy are not admissible and are not to be taken against anyone else unless or until you are satisfied with the rules that I have laid down that an agreement, a conspiracy, in fact existed."

McConnon seeks to maintain, that there is a necessity for his joining more than one conspirator in order to establish his guilt. He is attempting at this juncture to take advantage of the fact that the admissible evidence in this case was insufficient to permit the prosecution against the defendant Robiletto to continue past the government's case.

In this regard it is well to consider the decision in May v. United States, 175 F. 2d 1005. There the Court commented upon the evidence of acts of one Freeman who was indicted as a co-conspirator but against whom the Court directed an acquittal. When the Court ruled that it was not error to fail to strike the evidence as to Freeman, it was faced with a situation far more acute than the one presented in this case as here there was little evidence of the acts and declarations of Robiletto.

See also U. S. v. Campagna, 146 Fed (2d) 529.

McConnon cites many cases which hold that it takes at least two people to make a conspiracy. There is no question about that. But, in this case, there were two people, McConnon and Postma. It is certainly logical from the evidence to assume that McConnon believed that there were other members of the conspiracy. Certainly when he talked to Vogel on Friday and stated that "Nick has his oar in and it is now $30,000", McConnon believed that there was another conspirator besides Postma. His admissions to Hickey, previously quoted, show that he believed Postma not to be alone. When he made the initial demand he said "they will settle the strike." Were these the conspirators known to McConnon but "to the grand jury unknown?"

"Of course, at least two persons are required to constitute a conspiracy, but the identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted with persons whose names are unknown." Rogers vs. U. S., 340 U. S. 367, 375. See also U. S. v. Fox 130 Fed (2d) 56; Prichard v. U. S. 181 Fed. (2d) 326.

"The fact that under an indictment charging conspiracy only the appealing defendant was convicted is not a fatal inconsistency . . . Moreover, consistency in verdicts is not required." Bryan v. U. S. 120 Fed (2d) 843. See also Dunn v. U. S. 284 U. S. 390. Steckler v. U. S. 2nd Circuit, 7 Fed (2d) 59; West v. U. S. 161 Fed (2d) 452.

"The acquittal of some defendants on a conspiracy charge does not vitiate the conviction of others, where it is shown that a criminal conspiracy did in fact exist." U. S. v. Monroe 164 Fed (2d) 471; 474. See also Joyce v. U. S. 153 Fed (2d) 364, cert. den. 328 U. S. 86.

Here, therefore, is a defendant who, from the testimony, gave every evidence of his belief that others besides Postma were involved in the conspiracy, arguing to this Court that the conviction must be set aside because the proof was not sufficient to convict two besides himself. This is the defendant who requested a charge No. 33 "You may find McConnon not guilty and at the same time find Postma guilty of the conspiracy charged in this indictment." U. S. v. Miller 24 Fed. (2d) 353.

The Court charged consistently with this request

> "The defendants are not in a position to object to instructions given at their request." Bianchi v. U. S. 219 Fed (2d) 182.

According to this contention, now raised by the defendant McConnon, such a charge could not be possible. Nor did the charge direct the jury that it had to find that a conspiracy of two others existed before McConnon could criminally join in it. The defendant McConnon took no exception to the instructions of the Court in this regard. Can he now on appeal be heard in complaint of it? "Since no exception was taken to the instruction we will not consider the alleged error, unless substantial prejudice has resulted." Federal Rules of Criminal Procedure, Rule 30, 52-A, 52-B. Palmer v. Hoffman, 318 U. S. 109, 119; Johnson v. U. S. 318 U. S. 189, 200; U. S. v. Monroe, 164 Fed (2d) 471, 474.

The defendant McConnon continues to argue, in Point III, that some conspiracy might have occurred to bribe a labor official. This is consistent, with the remarks that he made in his opening to the jury. This was completely disproved by the evidence, as McConnon was not sent by the truckers, was not procured by them, but rather entered

the conspiracy by going directly to Postma at his own instance. "Manifestly, the crime of extortion can be committed without committing the crime of bribery." Bianchi v. U. S. 219 Fed (2d) 182.

Here the jury had more than sufficient evidence to justify its verdict, to reasonably conclude that there was "joint or integrated action" between McConnon and Postma. U. S. v. Masiello id. The question was most properly put to the jury in the charge of the Court; and by its verdict, the jury found McConnon "knowingly associated in an unlawful enterprise". U. S. v. Koch, 113 Fed (2d) 982; that he was in criminal concert; U. S. v. Teoni, 100 Fed (2d) 401, 403; that he had "a stake in the success of the venture", U. S. v. D. Rhee, 159 Fed (2d) 818; that there was "proof" of an agreement. U. S. vs. Tereira, 347 U .S. 1; and that there was a "common design, that is the essence of the crime." U. S. vs. Schneiderman, 106 Fed. Sup. 892. The concerted purpose or agreement was to burden interstate commerce with the extortion. McConnon, without question, entered into this common purpose with Postma and carried it forth to its completion by his many overt acts.

The citations by the appellant at page 25 of his brief of the Supreme Court's opinion in Local 807 case, 315 U. S. 521, 532, is not pertinent to the situation that existed in the present case. In the Local 807 case the problem was whether money had been extorted for protection or was paid for wages. In the present case, there can be no question of the purpose for which the money was given to McConnon; there can be no question of the "state of mind" of the truck owners. It was McConnon's intention to obtain $10,000 for Postma and he knew that to obtain the money Postma would keep the operators in a state of fear.

POINT III.

The Court did not err in failing to grant McConnon's motion for a severance.

The joining of defendants is permitted by Rule 8b of the Rules of Criminal Procedure. The very nature of the charge of conspiracy requires that defendants, alleged to have conspired together, be joined. The Court did not abuse its discretion in denying the motion.

U. S. v. *Cohen*, 145 F. (2) 82; cert. denied 323 U. S. 799.

U. S. v. *Lotsch*, 102 F. (2d) 35; cert. denied 307 U. S. 622.

POINT IV.

The Court did not err in its Charge with respect to the elements of the crime charged in the Indictment.

This point raised in the defendant McConnon's brief under Point V is treated generally in this brief under Point II.

While counsel for defendant quotes excerpts from the judge's charge, it is submitted that the charge read as a whole is meticulously correct and eminently fair to the defendant (748a). On this point, the Court said:

> "Innocent acts or the performance of normal activities in themselves are not sufficient to establish membership. But it is his knowledge of a wrongful scheme or plan and the intentional participation in it in the furtherance of its objective."

Again, the Court stated (756a): "The Government contends that Mr. McConnon, with his knowledge of the existence of the plan or scheme to extort money, wilfully, deliberately, and knowingly allied himself with it, took an affirmative step to the consummation of that plan."

POINT V.

The Hobbs Act is not unconstitutional, and it is applicable to the facts in this case.

The defendant McConnon, in his brief, has stated that he is "painfully aware of the decision of this Court in *U. S.* v. *Varlack*, 225 F. (2d) 665. In this argument, the appellant seems to think that because the Supreme Court, in the case of *U. S.* v. *Greene*, 350 U. S. 415, based its decision on the use of actual threats or violence and did not cite the Varlack, or the Bianchi, Hoolihan, or Callahan cases, but cited only the Kemble case, it must be inferred that the Court did not deem fear of economic laws to be within the definition of extortion. He also states that the denial of certiorari in those cases did not mean that the Court agreed with the Circuit Courts in those decisions. There is nothing in this devious reasoning which should persuade this Circuit to reverse itself. The facts of this case place it squarely within the rulings of this Court as not only stated in the cases cited, but more recently in the Masiello case.

The brief of the defendant McConnon complains that the word "wrongful" has "no meaning sufficiently clear enough, or unambiguous enough, to warn a citizen that he might be in violation of the Hobbs Act." This point is amply discussed in the Bianchi case, and see also the

Varlack case at page 669. The case cited by the appellant (International Longshoremen's and Warehousemen's Union v. Ackerman, 82 Fed. Supp. 65, construed the word wrongfully as used in the Hawaii conspiracy statute, which has no bearing or influence on this Court. The rule in this regard, as set forth in the cases cited, is conclusive.

POINT VI.

The verdict against Postma is supported by the evidence.

The contentions of the defendant Postma set forth in Points I and II of his brief are based primarily upon a re-argument of the facts. The jury's verdict of guilty has, for the purpose of this appeal, removed from the consideration of this Court all questions of the credibility of witnesses and the weight of the evidence. The verdict must be sustained if there is substantial evidence taking the view most favorable to the Government and giving the Government the benefit of all inferences which can be drawn from the evidence.

U. S. v. *Manton,* 107 Fed. 834 ,839.

Hulahan v. *U. S.,* 214 Fed. 441.

Bianchi v. *U. S.,* 219 Fed. 182, 186.

U. S. v. *Hood Brown,* 2 Cir. decided July 31, 1956.

A thorough discussion of the evidence will be found in Point I of the Government's brief, and any further discussion here would be repetitious.

Postma attempts to raise the issue that Section 1951 of Title 18 was intended to apply only to professional

gangsters and cites *Kemble* v. *U. S.*, 198 Fed. (2d) 885, cert. den. 344 U. S. 893. In this case, and in all other cases on this statute which have been cited before, the defendant was a labor union official. His argument that the payment in this case was a bribe punishable under Section 186 of Title 29, U. S. C., is without merit in the face of the facts, and of the law as set down in these cases. Postma's contentions contained in Point II of his brief are based on the false premise that all of the evidence was circumstantial. This, of course, is far from the truth. However, his contentions also fall in law.

See *Holland* v. *U. S.*, 348 U. S. 121, 139.

The Court charged as follows, with reference to circumstantial evidence:

> "It most always happens that the crime of conspiracy has to be proven, if proven at all, by circumstantial evidence. The very nature of the offense explains why this is so. People who connive together for an unlawful purpose do not usually talk of their plans where they will be overheard, nor do they make their arrangements in the open" (747a).

POINT VII.

The Trial Judge did not abuse his discretion in denying Defendant's motion for a mistrial on the ground of prejudicial newspaper articles.

Motions for a mistrial are directed to the discretion of the trial court.

> *U. S.* v. *Flynn*, 2 Cir. 216 Fed (2d) 354, cert. denied, 348 U. S. 909 rehearing denied, 348 U. S. 956.

Following the publication of the articles which the defendant claims to be prejudicial, the Court (342a) read the articles, and heard the argument of counsel. There was and is no showing that counsel for the Government made any prejudicial remarks to the press and this distinguishes most of the cases cited by the defendant. The alleged prejudicial features of the articles came from the statement to the press of the landlady who was not a witness. All that Government counsel said to the press when questioned was that Mr. Davenport was a subpoenaed witness.

Counsel for the defendants requested the Court (350a) to inquire of the jury if "they have read this article and if, having read it, they will be prejudiced thereby."

The Court complied with this request (353a-354a), and satisfied itself that no prejudice existed. The implication in the *Briggs* case cited by the defendant is that the circumstances may well raise the presumption of prejudice, which should be met by an inquiry even if the defendant does not request it. The presumption here has been met,

the jury was most properly cautioned, and the denial of the motion for a mistrial was not an abuse of discretion.

See *Rowley* v. *U. S.*, 185 Fed (2d) 523.

Reining v. *U. S.*, 167 Fed (2d) 362, 365.

The Court had a right to assume in this regard that it was dealing with an intelligent American jury of honesty and integrity.

U. S. v. *Griffin*, 176 Fed (2d) 727, 731.

U. S. v. *Stocker*, 100 Fed Supp. 143; 196 Fed (2d) 276.

POINT VIII.

There was no error in denying the defendant Postma's motion for a mistrial because of Counsel's remarks upon summation.

The statements of defendant McConnon's attorney and the Assistant United States Attorney complained of under this point of defendant Postma's brief were neither inflammatory nor prejudicial, but proper and fair comments on the evidence. Defendant McConnon's counsel's statement "Do you believe it is reasonable to believe that McConnon would enter into a conspiracy with a man from whom he had to pay off" was immediately objected to by Postma's counsel. The Court, instructing the jury, said:

> "Counsel's arguments must be limited to the evidence and the inferences to be drawn therefrom. The jury will remember the evidence. If there is any question about it they can obtain what it is. Counsel must confine himself to the evidence and the infer-

ences drawn therefrom—I do not recall any evidence of Postma paying McConnon—or McConnon paying Postma—please keep to the evidence."

It would appear that there was no error in the counsel's remarks nor in the judge's ruling. Mr. Gibbs' testimony (586a-590) would support the inferences made by counsel.

U. S. v. *White*, 223 F. (2d) 674, cert. den. 350 U. S. 888.

U. S. v. *Holt*, 108 F. (2d) 365.

POINT IX.

Failure to Prosecute

The discretion of the Court was properly exercised in denying defendant Postma's motion to dismiss the indictment for failure to prosecute.

The defendant was brought to trial within eleven months after the indictment was returned. At no time was he incarcerated and at no time did he demand a trial. In fact when the case was called for trial, he asked for a delay (14a-15a).

The case cited by appellant, *United States* v. *Provoo* (D. Md), 17 F. R. D. 183, affirmed 350 U. S. 857, covers this point very thoroughly and does not support the appellant's contention. In this case it was held that: "The right to a speedy trial may be waived and is waived unless it is demanded by the accused." To the same effect: *Compodonico* v. *U. S.*, 222 F 2d, 310, cert. den. 350 U. S. 831; *Chinn* v. *U. S.*, 228 F 2d 151.

In any event there was no delay in bringing this defendant to trial.

CONCLUSION

It is respectfully submitted that the Judgment of the Court should be affirmed in all respects.

The defendants have sought in their briefs to dissest the case. It is not to be dismembered and viewed in separate parts, but only as a whole.

U. S. v. *Patten,* 226 U. S. 525.

Viewed as a whole, the evidence conclusively proved the guilt of the two defendants. "The charge was unscrupulously fair, and in all respects accurate; and the defendants had a fair trial." *U. S.* v. *Varlack,* supra.

Respectfully submitted,

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APPENDIX

Opening Statement for Defendant McConnon

Mr. Katz: If Your Honor please, ladies and gentlemen of the Jury:

We find ourselves in a rather strange position. Though we have been probably the leading force, the leading spirit to bring home to the Government what has happened in this case, though we are the ones that pointed out that we were the emissary to bring the money to Postmas, we find ourselves indicted. Now, what are we indicted for? We are indicted for a conspiracy with Postma and Robilotto, with whom we have no relations with respect to this strike in 1951 or 1952, or with the strike at all. We are indicted for entering into a conspiracy with these two union leaders to call a strike in order to secure money.

Now, I say to you that that is not what happened. And I propose to give you a full and complete statement of what happened. I should like you to bear in mind that the only thing before you here is an unlawful agreement, an unlawful agreement to stop merchandise in order to get ten thousand dollars.

Who was McConnon? How did he come on the scene at all? I say to you that Mr. Vogel brought Mr. McConnon in, to carry the money that Vogel was paying. This was a bribe that was being passed through an intermediary, and we have had long relations with Mr. Vogel who helps us out in business, and we have been victimized by Mr. Postma too, and we stand here charged with extortion. Maybe people shouldn't try to help their friends. That doesn't make him guilty of this very serious crime, and that is all there is to the case, as we see it.

We were asked by Mr. Vogel to go to Peter Postma and ask him whether he will meet in small committee so they can heal the rift that developed between them. And Postma and Vogel are old friends. This is not a new stiuation between them. And we went over to Peter Postma and said to him, "Will you meet in a small committee?" And he said, "Who are they?" He said, "I don't know." So he said, "Find out from Vogel who they are." And he goes back to Vogel and Vogel says "It will be myself, it will be a Mr. Maybury; it will be a Mr. Wood."

So back goes McConnon to Mr. Postma and he says, "Maybury, Wood and Vogel." And Postma says, "Okay, I will meet them. Tell them to get a room." And he gets a room. And McConnon tells Postma what the room number is, and that is all he knows about it. And he never mentioned a single word about Robilotto. He doesn't even know the man. He met him once at the bar at the hotel where all these people were gathered, was introduced to him, and that is all he knows of him. He knows of no thirty thousand dollars; he never mentioned ten thousand dollars; he never mentioned one cent. And the next thing he knows, after the meeting Vogel calls him and says, "Come up and have a drink with us." So he goes up to the truckers, not to the union people, and he says, "What happened?" He said, "I think the matter is settled. Peter Postma is to bring it to a vote tomorrow morning." And tomorrow morning apparently was a vote and the employers' terms were accepted, and then the following Tuesday Vogel calls Mr. McConnon and says, "Come to my office."

And it is not unusual for McConnon to be called by Vogel, or for Vogel to call McConnon, McConnon to call

Vogel, and we will develop that relationship between those two gentlemen. And he asks him, "Will you take this package to Peter?" And he says, "What is in the package? Is there money in the package? Seal it." And he seals it and he gives it to McConnon, drives him to the hotel, having made arrangements to meet Postma. He meets Postma and gives him the package. And a few days later this same thing is repeated, and he gives him another package, but on behalf of Vogel. Because that is the man we are helping out here. At his request. And that actually is the story.

Then we told this story to the Government. We told it to the F. B. I.; we told it to the International Union; we told it to the Grand Jury, and then Mr. Vogel comes down and asks us, "Will we change our story a little bit." And we said, "No. That is not the way it happened, John."

And John wanted to angle a little bit, so it shouldn't look like he was bribing Postma. And the other people asked him to change his story, and he said, "I won't change my story. That is what happened, and I will testify that way before the Jury."

Now, that is the case. There is no conspiracy involved there. We are a messenger for the bribing employer in this case. And we delivered the money that we received from the employer in a package to Mr. Postma.

Now, this is a very serious charge. The charge of obstructing commerce by means of extortion has some very confusing elements, because extortion is not racketeering. Let's make no mistake about that. An extortion is not a

shakedown either. Let's make no mistake about that. That is a very subtle crime and cannot be misused, and it is being misused in this case.

And I say to you watch this testimony very careful and see if you can find the conspiracy between Postma and Robilotto to call a strike, to prolong a strike in order to get ten thousand dollars.

We were very anxious to get that strike settled so our trailerships would move. Just like the other employers. And that is our case.

The Court: We will take a short recess before we start taking evidence.